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November 4, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: August 4, 2005

Case Number: TSO-0275

This Decision concerns the eligibility of xxxxxxxxxxxxxxxx (hereinafter "the individual") for continued access authorization. The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on the testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. For the reasons detailed below, it is my decision that the individual's access authorization should not be restored.

I. BACKGROUND

On May 27, 2005, the DOE issued a notification letter to the individual. The notification letter indicated that the individual's wife telephoned the police on three occasions, March 17, August 31 and November 20, 2003 to report domestic violence. On March 17, 2003 and November 20, 2003 the police responded and determined that a cooling off period would resolve the problem. Notification letter paragraph 1 and 2. However, with respect to the August 31 incident the police responded, transported the individual to the police station and issued him a citation for domestic battery. The police citation and police report are part of DOE Exhibit #6. On September 10, 2003, the local court issued a "No Contact Order" to the individual. DOE Exhibit #6. On October 28, 2003, the court issued a judgment on the domestic battery citation requiring the individual to pay a \$185 fine.¹ DOE Exhibit #7. The notification letter indicates that domestic violence raises a security concern under 10 C.F.R. §710.8(l) (Criterion L).

The individual notified the DOE of the August 31, 2003 citation, the September 10, 2003 no contact order and the October 28, 2003 judgment on November 19, 2003. DOE Exhibit #8 is the individual's e-mail report. The Notification Letter indicates the individual's failure to report the domestic violence citation and the fine in a timely manner constitutes a security concern under 10 C.F.R. §710.8(f) (Criterion F).

The notification letter also indicates the individual's financial problems raise a Criterion L security concern. The individual's financial problems include i) the November 2004 foreclosure sale of his home (notification letter paragraph 5); ii) the individual's failure to repay a loan on a truck which was destroyed

¹ The court's October 28, 2003 judgment also ordered and suspended a 180 day incarceration. DOE Exhibit #6. The individual's November 19, 2003 e-mail to the DOE indicates that he is currently on a two year probation. DOE Exhibit #8.

in a traffic accident (notification letter paragraph 7); and iii) the individual's delinquency on his one credit card (notification letter paragraph 8).

The notification letter informed the individual that he was entitled to a hearing before a hearing officer in order to respond to the information contained in the notification letter. The individual requested a hearing. I was appointed to serve as the hearing officer. In accordance with 10 C.F.R. § 710.25(e) and (g), I convened a hearing in this matter (hearing).

At the hearing the individual was represented by his wife. In her opening statement she indicated that the 2003 domestic violence resulted from stresses after their June 2002 marriage. Those stresses came primarily from two sources. First, she has four children from a previous marriage and the individual has one. Merging their families and coordinating their parenting philosophies was a difficult process. The second source of stress was the expenses relating to the ongoing child custody dispute between the individual and his former wife . Transcript of Hearing (Tr.) at 12.

In her opening statement the individual's wife also indicated that the domestic violence security concern has been mitigated by the individual's anger management and marital counseling. The counseling has enabled the individual to manage his anger and to settle disputes in an appropriate manner. As a result of the counseling, the domestic violence ceased at the end of 2003. Tr. at 11.

The individual's wife also discussed the family's financial problems. She indicated that she and the individual plan to file for bankruptcy. She believes that the bankruptcy filing will relieve the family of their past debts and in the future they will be able to live within their means. She summarized her position:

Obviously, the financial problem is . . . an ongoing thing, because there have been many, many circumstances that continue to follow us and won't leave us alone. But we deal with it the best that we can. And we do not live beyond our means; I will show that.

Tr. at 12.

Finally, she indicated that the individual is a dedicated firefighter and he has a good support system. She believes that the individual's dedication to his profession and accomplishments at work indicates that he meets the criteria for an access authorization. Tr. at 12.

II. HEARING

A. The Individual's Wife

1. Domestic Violence

The individual's wife testified that she was married to the individual in June 2002. She and the individual had different life experiences and styles regarding dealing with their children. After the marriage, they had considerable difficulties organizing the household. When their styles clashed and they argued, she would try to leave the home. However, the individual would try to "restrain" her from leaving by holding or

pushing her or by blocking the door or by taking her car keys. Tr. at 28. She called the police on three occasions to report the individual's inappropriate domestic behavior. Tr. at 29. On two occasions the police negotiated a cooling off period and on the third occasion they issued a domestic battery citation to the individual.

The individual's wife testified that she and the individual began seeing a counselor in the spring of 2003. Tr. at 32. They saw the counselor weekly for a number of months. The last domestic violence took place in November 2003. Tr. at 30.

2. Financial Irresponsibility

The individual's wife testified about the family's financial problems. She indicated that prior to April 2003 they were trying to refinance their home with a new mortgage lender. Tr. at 215. Despite repeated efforts they were unable to obtain a new mortgage. Tr. at 215. In April 2003, after they were unable to obtain a new home mortgage, their financial problems forced them to stop making mortgage payments. Tr. at 217. They received a foreclosure notice from their mortgage company in January 2004. Tr. at 217. She contacted the mortgage company and was referred to a subsidiary firm (hereinafter the subsidiary) for debt restructuring assistance.

The wife recounted the events of the restructuring as follow: on August 21, 2004, at the direction of the subsidiary, they signed mortgage documents from the subsidiary for a new mortgage loan of \$141,307. Tr. at 207 & 223. The proceeds of that mortgage were to be used to pay off the old mortgage. At the same time, at the direction of the subsidiary, she sent the mortgage company a check for late fees and legal fees of \$2,424. Tr. at 202 & 206-207. The mortgage company sold their home at auction on November 5, 2004 and served the individual with a writ of eviction on January 22, 2005. Tr. at 204. When they received the writ of eviction she telephoned the subsidiary and was told to contact the mortgage company. Tr. at 208. When she contacted the mortgage company she was referred to the subsidiary. Tr. at 208. She then called the title company and learned, for the first time, that their house had "been sold out from underneath us." Tr. at 209.

The individual's wife testified that they have never received a statement from the mortgage company about the proceeds from the sale of their home. She indicated that one of the reasons they are considering filing for bankruptcy is there may be a deficiency between the proceeds from the sale of their home and the amount of the outstanding mortgage. Tr. at 210-211. She believes the bankruptcy proceeding will relieve them of the obligation of repaying that deficiency.

B. The Individual's Counselor

The individual's counselor testified that she starting treating the individual in May 2003. Tr. at 40. During the first several months, she saw the individual and his wife on a weekly basis. Tr. at 40. She testified the individual has "no history of violence at all." Tr. at 54. However, she indicated:

[the individual's wife] is a very high intensity person and I don't think [the individual] knew what to do with that. . . . when he felt helpless and hopeless he would try and stop [the

individual's wife] from leaving the house, and then that would get physical between them. . . . He never denied getting violent. He would fight for the keys sometimes if [the individual's wife] was going to leave. He would stand in front of the door, push her back, not let her leave. And that's the kind of violence that happened. I don't think there was ever anything like blood drawn. I don't think there was ever anything like black eyes.

Tr. at 54.

She testified that the individual was very receptive to counseling and he often called her between sessions to discuss problems in his life. She believes the stresses in the individual's life are related to disciplining his son and the family's financial problems. Tr. at 41. She testified:

[The individual] came through a situation that I thought could have been impossible, would have been for a lot of couples. [The individual] worked really hard, and I really respected [him] for that.

Tr. at 43.

The counselor testified that the individual is an honest person and is dedicated to his DOE job. Tr. at 48. She testified that she believes the individual now is able to control his behavior, and the domestic violence problem is unlikely to recur. Tr. at 64.

C. The DOE Consulting Psychiatrist

The DOE consulting psychiatrist evaluated the individual in February 2005. DOE Exhibit #23. He testified that the individual was cooperative and his answers were consistent with the background information provided by the DOE. Tr. at 76.

The DOE consulting psychiatrist testified that the individual has obsessive tendencies that cause the individual to dwell on problems. Therefore, the individual tends to accumulate frustration and resentment which can "sometimes break through, and then he can react inappropriately with anger." Tr. at 71. He does not believe there was any violence in the individual's first marriage, nor does he believe the individual's domestic disputes indicate a pattern of violence. Tr. at 67-68. He testified that he believes the individual's anger management counseling has been successful in helping him control his anger. He believes it is unlikely that there will be any future domestic violence in the individual's household. Tr. at 69 and 78-79.

D. The Individual's Mother

The individual's mother testified that she was aware of the 2003 domestic violence incidents and the counseling that the individual and his wife have received. Tr. at 89. She believes the counseling has benefited the individual. She indicated that there has not been any domestic violence for two years. Tr. at 90.

E. The Daughter of the Individual's Wife

The daughter of the individual's wife testified that she is 19 years old, works 40 hours a week, attends college on a full time basis, has recently obtained her own apartment and supports herself. Tr. at 136 & 143. She observed the domestic violence in 2003. Tr. at 130. She testified that the relationship between the individual and her mother is now much better and she believes the domestic violence has ended. Tr. at 131.

F. The Son of the Individual's Wife

The son of the individual's wife testified that he lives at home. Tr. at 176. He testified that he was not at home during the 2003 domestic violence but his younger sister reported to him when his parents were fighting. Tr. at 172. He testified that his mother never required any medical treatment as a result of the domestic violence. Tr. at 173.

G. The Individual's Friends

Friend #1 testified that he has known the individual socially for seven years. Tr. at 103. He testified about the August 31, 2003 domestic violence incident. Shortly after the argument with his wife, the individual arrived at the individual friend's home to discuss the situation. The police also came to the individual friend's home. The friend heard the police tell the individual that he was not under arrest. However, he testified that the police drove the individual to the police station. Tr. at 107.

Friend #1 testified that the individual's counseling has been a great success. Tr. at 109. Occasionally the individual seeks his counsel when there is a verbal argument with his wife. Tr. at 110. However, the friend does not believe there has been any domestic violence since the beginning of 2004. Tr. at 110. Friend #1 testified that the individual and his wife have a happy marriage. Tr. at 111.

He is aware the individual has financial problems. Tr. at 112. He believes that the expense associated with the larger family and the child custody dispute with his former wife was the initial reason for the individual's financial problems. Tr. at 113 & 116. He believes that the individual was "getting a handle on" his financial problems. Tr. at 115. However, the individual was reassigned to a lower paying job because of the loss of his access authorization. This reassignment significantly reduced the individual's income and resulted in additional financial problems. Tr. at 115.

He testified that he believes the individual has "gone through the proper and correct channels to try and resolve the financial problems." Tr. at 112. He testified that he has obtained additional part time employment and he believes there will be further additional part time employment in the near future. Tr. at 112.

Friend #2 testified that she was a neighbor of the individual for two years and has known him for a total of four years. Tr. at 122. She sees the individual on a weekly basis. She testified that she was aware of the domestic violence in 2003. She testified that as a result of the individual's counseling their relationship is

much more stable and she does not believe there is currently any domestic violence. Tr. at 123. She testified that the individual is an honest person and is not a security risk. Tr. at 125.

H. The Individual's Co-worker and Supervisor

Co-worker #1 testified that she has known the individual for eight years. Tr. at 147. The individual often comes to her house to talk with her husband and herself about his disagreements with his wife. Tr. at 148. She testified that the individual has worked very hard on "resolving differences in the appropriate way." Tr. at 148. She believes the individual has "learned the skills necessary to work through differences." Tr. at 149.

She testified that she believes the individual has had serious problems with finances but is now better at controlling his finances. T. at 155 & 157. She indicated that the individual's wife is now working more hours at her part time job. In her view both the individual and his wife are more responsible when making purchasing decisions. Tr. at 157.

Co-worker #1 summarized that she believes the individual is always professional and is a dedicated firefighter. Tr. at 149. She does not believe the individual is a security risk. Tr. at 150.

Co-worker #2 testified that he has worked with the individual for five years. Tr. at 168. He believes the individual is trustworthy and honest. T. at 168.

The individual's supervisor testified that he has known the individual for 5 years. Tr. at 165. He believes that the individual is trustworthy. Tr. at 165.

I. The Individual

The individual testified that the beginning of his second marriage was very tough because he and his wife were very different people. Tr. at 179. He testified that the counseling has taught him how to reach compromises regarding the problems in their marriage. Tr. at 180.

The individual testified that he has never been arrested. Tr. at 184. He testified that he notified the DOE Office of Security about the August 2003 domestic violence citation a few weeks after his October court appearance when he was ordered to pay a fine of \$185 for domestic battery. Tr. at 185. He testified that he recognizes he had to report the August domestic battery citation. However, he assumed that he was not required to report the citation until after his court date. Tr. at 266.

Finally, the individual testified about his financial difficulties. He testified that his principal problem related to his home mortgage. He was behind at least three months in his mortgage payment when he contacted the mortgage company. They told him they would only accept the full payment of the overdue payments and they referred him to the subsidiary for a debt restructuring. Tr. at 191 & 195. The subsidiary told him "this shouldn't take very long, to hold off on payments . . ." Tr. at 191. He testified that "it ended up taking a lot longer than they said. And then we ended up being more than six months behind." Tr. at 192.

The individual testified that he is current on his rent. Tr. at 226. He testified that the family currently has adequate funds to pay their rent, utilities and truck payments. Tr. at 228. He is slightly behind in his electric bills. Tr. at 229. He indicated he and his wife work together to review expenditures and pay bills and this approach has helped them better manage their finances. Tr. at 231. He recognizes that the family needs to increase its income and he is currently seeking part time employment with two fire departments. Tr. at 227. He believes that in a year they will be financially secure and have a little money to spare. Tr. at 231.

In order to document his assertion the individual submitted a budget. The budget is individual's Exhibit #24. That budget is a one page document that indicates a figure for 11 regular monthly expenses. They include rent, truck payment, electricity, propane, etc. The budget includes no information on the family's monthly income.

The individual testified that he and his wife are working on the papers required to file for bankruptcy. Tr. at 232. He summarized by indicating that "I believe we will be able to keep caught up with our current debts after the slate is clear." Tr. at 259.

J. The Security Specialist

The security specialist testified that the failure to report a domestic battery citation in a timely manner is a security concern. She is concerned that not reporting the domestic battery citation in a timely manner "was intentional so that the Department of Energy would not see the police report, would not see the ongoing pattern (of domestic violence), would not see that the police had been called to his residence." Tr. at 288. She admitted that the individual did report the event on November 19, 2003. Tr. at 283. She testified that there have been no other failures to report information to the DOE. Tr. at 283.

III. REGULATORY STANDARD

In order to frame my analysis, I believe that it will be useful to discuss briefly the respective requirements imposed by 10 C.F.R. Part 710 upon the individual and the hearing officer.

A. The Individual's Burden of Proof

It is important to bear in mind that a DOE administrative review proceeding under this Part is not a criminal matter, where the government would have the burden of proving the defendant guilty beyond a reasonable doubt. Once a security concern has been raised, the standard in this proceeding places the burden of proof on the individual to bring forth persuasive evidence concerning his eligibility for access authorization. 10 C.F.R. §§ 710.21(b)(6), 710.27(b), (c), (d).

This burden is designed to protect national security interests. The hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The individual must come forward at the hearing with evidence to convince the DOE that

restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a).

This is not an easy evidentiary burden for the individual to sustain. The regulatory standard implies that there is a presumption against granting or restoring an access authorization. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for the granting of access authorizations indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991) (strong presumption against the issuance of an access authorization). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. In addition to her own testimony, the individual in these cases is generally expected to bring forward witness testimony and/or other evidence which, taken together, is sufficient to persuade the hearing officer that restoring access authorization is clearly consistent with the national interest. *Personnel Security Hearing (Case No. VSO-0002)*, 24 DOE ¶ 82,752 (1995).

B. Basis for the Hearing Officer's Decision

In a personnel security case under Part 710, it is my role as the hearing officer to issue a decision as to whether granting an access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. 10 C.F.R. § 710.27(a). Part 710 generally provides that "[t]he decision as to access authorization is a comprehensive, common-sense judgment, made after consideration of all relevant information, favorable and unfavorable, as to whether the granting of access authorization would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.7(a). I must examine the evidence in light of these requirements, and assess the credibility and demeanor of the witnesses who gave testimony at the hearing.

IV. ANALYSIS

The individual has presented testimony from his friends and co-workers that he is honest and dedicated his profession. I have been convinced that he is a dedicated employee and that his friends and co-workers believe he is honest. Nevertheless, these findings do not resolve the security concerns regarding his previous behavior. Therefore, I will analyze the arguments he has presented regarding the three areas of concern.

A. Domestic Violence

I believe the individual has demonstrated that the security concern related to domestic violence has been mitigated. The DOE psychiatrist and his counselor testified persuasively that they did not believe that there will be any future domestic violence. In addition the testimony of the individual's family and friends indicated that there has not been any domestic violence in the last 18 months.

B. Financial Irresponsibility

The record is clear that the individual failed to pay his mortgage between April 2003 and January 2005, to fully pay a truck loan and to pay the balance due on his one credit card. The evidence indicates the financial problems were initially caused by expenses related to the individual's divorce and expenses related to his child custody dispute. The problems continued because the expenses associated with the larger family exceeded the individual's income.

1. Mortgage

First I will consider the individual's argument that the security concern relating to his failure to pay his home mortgage was caused by the erroneous advice he received from the subsidiary. The individual and his wife believe that the subsidiary provided them with bad advice and failed to provide them with the new mortgage loan which they promised to issue. They maintain that the subsidiary advised them that they did not need to make mortgage payments during the refinancing period. The individual has not convinced me that the foreclosure was not caused by his own negligence. The evidence shows that he stopped making payments before he contacted the subsidiary; and that he received communication from the mortgage company indicating he was overdue. Aside from this testimony, they presented no evidence that he was promised a new loan and that during the interim he was not responsible for continuing to pay his previous mortgage.

Based on these factors, I see no deceit by the mortgage company or the subsidiary, and I am not persuaded by the individual's contention that the actions of the mortgage company should be considered a mitigating factor relating to the security concern arising from his failure to pay his mortgage.

2. Future Actions to Mitigate the Financial Concern

The individual attempts to mitigate the financial irresponsibility security concern by a showing that he will be financially responsible in the future. His plan is to file for bankruptcy to have his previous debt forgiven. After those debts are forgiven, he believes that he will be able to live within his means.

I do not believe the individual has demonstrated that he will actually file for bankruptcy, nor has he shown that if he did file he would receive meaningful debt relief. The only document related to the bankruptcy that the individual filed was Individual's Exhibit #17. That document is a one page agreement dated September 2, 2005 between the individual's wife and a firm that will type the individual's bankruptcy forms. The individual was not clear as to when he would file for bankruptcy. When asked why he believed all of his debts would be forgiven in bankruptcy, he turned to his wife and who then testified that she filed for bankruptcy 1988 and that she was relieved of all outstanding debts. There were no other witnesses or reasoned argument about the effect of the bankruptcy on the individual financial situation. While the individual clearly believes that the bankruptcy court will forgive his debts, the information he provided has not convinced me that he will actually follow through on his plans to file for bankruptcy or that a bankruptcy filing would significantly change his financial prognosis.

I have also not been convinced that the individual will be able to live within his means after his debts have been forgiven. As I stated above, the individual's budget provides a schedule of his 11 monthly expenses (truck payment, rent, electric bill, etc). However, he provided no receipts to indicate that he was current on those bills or that the expense amounts listed were accurate estimates of the actual amounts he spends per

month in those categories. He also testified that he is trying to get a second job and that the salary his wife receives from her part time job has increased. However, he provided no schedule indicating current or projected monthly income. The only information that the individual provided on income were some copies of his wife's salary checks. Individual's Exhibit #18. The individual never referred to that exhibit during the hearing and I am not sure how to interpret those checks. Therefore, I believe the individual has failed to provide a comparison of his monthly expenses with his monthly earnings that would even suggest that he will, in the future, be able to live within his means even if all of his debts are extinguished in bankruptcy. His testimony that, in the future, his income will exceed his expenses is a hope. However, he has not established that he can achieve that goal. Therefore he has not mitigated the financial irresponsibility security concern.

C. Failure to Report

The notification letter indicates that the individual "failed to report his August 31 arrest in a timely manner" and that this creates a Criterion F security concern. The individual's response is that the domestic battery citation was not an arrest. I agree. The individual's testimony, the testimony of friend #1 and page 4 of the police report (DOE Exhibit #6) have convinced me that the individual was not under arrest.

However, the finding that he was not under arrest does not resolve the security concern regarding late reporting. The testimony of friend #1 and page 2 of the police report indicated that the individual was transported by the police to the police station. Being transported to the police station for questioning and being issued a citation for domestic battery together are an event that must be verbally reported to the DOE with 48 hours.² Furthermore, as a result of the citation, the individual received a no contact court order on September 10, 2003. That order also should have been reported to the DOE within 48 hours. The individual reported both of those events on November 19, 2003. DOE Exhibit #8. His report was more than 30 days after his citation and the issuance of the no contact order. The individual's late reports are clearly a security concern under Criterion F.

The individual claims in his e-mail notification that he was late in reporting the information because "I was not sure who to notify and how I was supposed to notify security of these matters." DOE Exhibit #8. This statement is disingenuous and clearly does not respond to the late reporting concern. As a holder of an access authorization, the individual is responsible for using common sense and making inquiries as to what must be reported, when it must be reported and to whom it must be reported. His failure to take any steps in that regard for several months shows carelessness and disregard for security procedures. I am confident if he had made such a contact, he would have been instructed to make a report to security. Moreover, the fact that he did make the report in November 2003 shows that once he resolved to reveal the incident to the DOE he was able to effectuate the report. His excuses and rationalization to the contrary are just not persuasive. Therefore, I find that the individual has failed to resolve the Criterion F security concern.

² A holder of a DOE access authorization is required to report to personnel security (verbally within two working days and submit written documentation within five days) all arrests, criminal charges and detentions. See DOE Order 472.1B (Personnel Security) Section 7 b(2)(a) and DOE Exhibit #10. Generally if an individual is uncertain if he had should report an incident with the police he should contact the DOE for guidance. The holder of an access authorization should make certain that all derogatory information is promptly reported to the DOE.

V. CONCLUSION

I have concluded that the individual has mitigated the security concern related to domestic violence. However, the individual has not mitigated the DOE security concern about late reporting under Criterion F nor the financial irresponsibility concern under Criterion L of 10 C.F.R. § 710.8. In view of the record before me, I am not persuaded that restoring the individual's access authorization would not endanger the common defense and security and would be clearly consistent with the national interest. Accordingly, I find that the individual's access authorization should not be restored.

The review procedures applicable to proceedings under Part 710 were revised effective September 11, 2001. 66 Fed. Reg. 47061 (September 11, 2001). Under the revised procedures, the review is performed by an Appeal Panel. 10 C.F.R. § 710.28(b)-(e).

Thomas L. Wiekert
Hearing Officer
Office of Hearings and Appeals

Date: November 4, 2005